United States Court of Appeals for the Second Circuit



APPELLEE'S BRIEF

74-2410

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UNITED STATES COURT OF APPEALS

For the Second Circuit

BERNARD KAMHI,

Plaintiff-Appellant,

-against-

MANNIE COHEN,

Defendant-Appellee,



APPELLEE'S BRIEF

KADANOFF AND HAUSSMAN COUNSELORS AT LAW 16 COURT STREET BROOKLYN, N. Y. 11201



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UNITED STATES COURT OF APPEALS SECOND CIRCUIT

BERNARD KAMHI.

Docket No. 74 2410

Plaintiff-Appellant,

-against-

MANNIE COHEN,

Defendant-Appellee,

APPELLEE'S BRIEF

STATEMENT OF ISSUES

1. Is Shirley Kamhi an indispensable party to this action to set aside in part, a judgment of divorce, in favor of Shirley Kamhi and against Bernard Kamhi, the plaintiff-appellant herein, granted in the Supreme Court of the State of New York, County of Kings.

STATEMENT OF THE CASE

The statement of the case set forth in the brief of plaintiff-appellant is correct insofar as it is fact-ually set forta, but incorrect as to certain conclusions.

Plaintiff-appellant concludes that the complaint was upheld against the defendant-appellee because of the denial of the motion to dismiss. The obvious import, when

when taken in the context of declaring Shirley Kamhi a necessary party; that the issue might be litigable if Shirley Kamhi was a party. There is no conclusion that a good cause of action exists against the defendant-appellee.

Plaintiff-appellant also predicates his argument upon the statement that the judgment granted in the Supreme Court, Kings County, in favor of Shirley Kamhi and against the plaintiff-appellant is in rem, when in fact is is, in personam.

STATEMENT OF FACTS

On April 25, 1974, a judgment of divorce was granted in favor of Shirley Kamhi and against Bernard Kamhi, the plaintiff-appellant herein, App. p. 22(a); that, as a part of said judgment, defendant-appellee was appointed receiver and sequester, subject to his qualification, and in fact the defendant promptly, properly qualified as such receiver and sequester.

Thereafter, defendant-appellee sought to discharge his responsibilities and took certain steps to locate and secure plaintiff's assets in the State of New York.

Plaintiff thereupon commenced this action against the defendant to, in substance, set aside the essential provisions of the judgment of divorce. Plaintiff seeks a declaration that he is a resident and domiciliary of the State of Nevada since October 18, 1973, and a declaration that the service

of the summons and complaint in the Kings County action, upon the plaintiff, will not support an <u>in personam</u> judgment. He also seeks a declaration that the property of plaintiff cannot be seized under sequestration; that any seizure is null and void and that the defendant-appellee be enjoined from interfering with plaintiff's property and that any property already sequestered by the defendant-appellee be restored to the plaintiff.

The essence of plaintiff's claim is that the judgment is not valid to support the appointment of a receiver and sequester as it is in rem and not in personam.

That the only relation of the defendantappellee is as a receiver and sequester, and not as a party to
a divorce action.

That the Supreme Court in Kings County specifically found that the plaintiff, in this action (defendant in Supreme Court) was a resident of the State of New York. App. p. 24(a).

ARGUMENT

The judgment in the Supreme Court, Kings
County is good and valid and in personam. In the proper context
of the dismissal for failure to join an indispensable party in
the Court below. The argument hat the complaint states a good
cause of action is utterly empty.

The thrust of the instant action is, in fact, to set aside Shirley Kamhi's judgment of divorce, properly secured in the Supreme Court of the State of New York. The appointment of a receiver in the judgment itself belies the possibility of $\underline{in \ rem}$ jurisdiction, since under New York law it could only be in personam since there is no claim of a purported seizure by a receiver prior to judgment, nor was there any appointment of a receiver prior to judgment. The scope of authority of the receiver and sequester, where the challenge is to the jurisdiction, is in the Supreme Court, Kings County, or perhaps in the Federal Court with Shirley Kamhi as a party-defendant. The judgment which is the subject of this suit is, in fact, Shirley Kamhi's judgment. POINT I

THE JUDGMENT RENDERED IN THE SUPREME COURT, KINGS COUNTY, IS JURISDICTION-ALLY PROPER AND IN PERSONAM AND SUP-PORTS THE APPOINTMENT OF A RECEIVER AND SEQUESTER

That the judgment granted in the Supreme Court, Kings County, was based upon in personam jurisdiction. Domestic Relations Law, Section 232, sets forth the required notice to defendants in a matrimonial proceeding.

CPLR Section 313, provides for service without the state, giving personal jurisdiction and reads as follows:

"A person domiciled in the State or subject to the jurisdiction of the Courts of the State under Section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state, or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction."

CPLR Section 314 makes Section 313 specifically applicable to matrimonials:

"Service may be made without the state by any person authorized by Section 313 in the same manner as service is made within the State:

1. in a matrimonial; or. . . .

The issue is whether plaintiff-appellant was a domiciliary at the time of service in the Supreme Court action, and the Supreme Court, Kings County, did in fact determine, by virtue of the judgment it issued, that Shirley Kamhi met the in personam jurisdictional standards.

Therefore, if plaintiff-appellant desires to litigate the jurisdiction he must do so with Shirley Kamhi, and not with the defendant. It is the Judgment of Shirley Kamhi that he seeks to set aside, and not that of the defendant.

POINT II

THE SEIZURE OF PLAINTIFF'S PROPERTY
BY DEFENDANT IS PROPER PURSUANT TO
THE JUDGMENT OF DIVORCE

Defendant-appellee was appointed receiver

and sequester pursuant to Domestic Relations Law 243, which is set forth in full, at App. p. 57(a)-58(a).

Defendant-appellee is acting pursuant to the authority granted by the Court of competent jurisdiction, the Supreme Court of the State of New York. That the receivership arose solely because of an action by Shirley Kamhi and flows completely therefrom.

The claims that the seizures by defendant have nothing to do with Shirley Kamhi, because the receiver is subject to the order of the Court, are meaningless. No receiver has that "carte blanche" authority to do as he pleases. In fact, Shirley Kamhi could have been appointed as the receiver, would the plaintiff have started an action against Shirley Kamhi in her capacity as the receiver only?

Plaintiff-appellant cites <u>HART v. FEELEY</u>, 109F, Supp. 3, which is not applicable. It is precisely the opposite of this situation, where the real party who has an interest in the judgment, is not a party to the instant action.

The statement on p.10 of appellant's brief with reference to the fact that "he has capacity to sue in any district, without ancillary appointment, and may be sued with respect thereto", is totally untrue in that defendant's authority by the judgment of divorce is specifically limited to assets in the State of New York.

Appellant also cites EDWARD B. MARKS MUSIC CORPORATION v. JERRY VOGEL MUSIC CO., 47F. Supp. 490, which is also not applicable in that this case deals with a true trustee and not with a receiver who's authority is judicially created to enforce rights arising out of the third party's judgment.

It is clear that the real party in interest is, in fact, Shirley Kamhi, and she is, in fact, an indispensable party.

POINT III

SHIRLEY KAMHI IS AN INDISPENSABLE
PARTY TO THE ACTION AND AS SUCH SHOULD
BE JOINED AS A PARTY DEFENDANT

Plaintiff would have the defendant-appellant defend the rights of Shirley Kamhi, where he has no capacity, authority or ability to do so.

Pursuant to CPLR 235, the receiver is denied the ability to examine and review the matrimonial file in the Supreme Court. In fact, it is the plaintiff in this action who has the right to examine the file, which right is not accorded to the defendant.

The simple statement relied upon by appellant from <u>WILLIAMS</u> v. <u>NORTH CAROLINA</u>, (2) 325 U.S. 226, is relatively meaningless because it is out of context; the case does not in any way support the position of the plaintiff.

Plaintiff-appellant also sets forth on p.12 of his brief the amendment to CPLR Section 302, and has respect-fully submitted that this is not applicable because it is completely after the fact. It is now appropriate to determine the validity of the statute that has no bearing on the instant case, just for the purpose of setting forth some sort of a legislative attitude that is not before this Court.

In his discussion of CPLR Section 303, plaintiff really gets to the heart of the matter. The effect of CPLR 303 is to provide that if an action is commenced in the State of New York, by a person who is not subject to the personal jurisdiction of the state courts, his attorney or the clerk of the court, during the pendency of the action, becomes the agent for service of a summons in an action brought by the defendant against plaintiff. Plaintiff herein has long persisted that jurisdiction is in rem and therefore is not subject to the jurisdiction of the Courts of the State of New York.

Plaintiff simply does not want to make Shirley Kamhi a party because the plaintiff can then be served personally in the State of New York, with any summons with reference to actions or causes of actions that Shirley Kamhi may have against plaintiff, and she would thereby have an unqualified right to pursue any of her remedies in the State of New York.

It therefore becomes readily apparent that the sole purpose of this collateral attack, in the Federal Court, is to avoid the submission of personal jurisdiction on account of any other causes or claims of Shirley Kamhi.

CONCLUSION

DEFENDANT-APPELLEE RESPECTFULLY REQUESTS THAT THE ORDER OF JUDGE NEAHER BE AFFIRMED.

KADANOFF AND HAUSSMAN, P.C.

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UNITED STATES COURT OF APPEALS SECOND CIRCUIT BERNARD KAMHI, Docket No. 74-2410 Plaintiff-Appellant, -against-AFFIDAVIT OF PERSONAL SERVICE MANNIE COHEN, Defendant-Appellee. STATE OF NEW YORK COUNTY OF KINGS MARCIA RUBIN, being duly sworn, deposes and says: That deponent is not a party to the action, is over the age of 18 years, and resides at 50 Court Street, Brooklyn, New York. That on the 26th day of December, 1974. deponent served the within APPELLEE'S BRIEF, upon FRANK DELANEY, ESQ., or , Secretary to FRANK DELANEY, ESQ., by delivering a true copy to him/her personally.

Deponent know the person so served to be the person mentioned

and described in said papers, as the attorney or secretary

Sworn to before me

therein.

this 26th day of December, 1974

abeck nancus

ELIZABETH MARCUS NOTARY PUBLIC, State of New York No. 24-4527410

Qualified in Kings County

Commission Expires March 30, 19 76